

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY SESSION, 1996

FILED
July 26, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee,)
)
VS.)
)
LARRY MCKAY, and)
MICHAEL EUGENE SAMPLE)
Appellant.)

C.C.A. NO. 02C01-9506-CR-00175

SHELBY COUNTY

HON. BERNIE WEINMAN
JUDGE

(Post Conviction Relief)

FOR THE APPELLANT:

LARRY MCKAY
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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellants Larry McKay and Michael Eugene Sample were convicted of murder and sentenced to death in 1982. Since the Tennessee Supreme Court upheld these convictions and sentences in State v. McKay, 680 S.W.2d 447 (Tenn. 1984), cert. denied, 470 U.S. 1034 (1985), Appellants have filed numerous post-conviction petitions with the trial court. Two of these post-conviction proceedings have been before this court on appeal with the result that neither Appellant was entitled to post-conviction relief. Sample v. State, No. 02C01-9104-CR-00062, 1995 WL 66563 (Tenn. Crim. App. Feb. 15, 1995); McKay v. State, No. 25, 1989 WL 17507 (Tenn. Crim. App. Mar. 1, 1989). In addition, an entirely different post-conviction petition is, at this time, pending before another panel of this court.

This, Appellants' most recent post-conviction appeal, arises from a pro se petition filed in the Memphis Criminal Court. On January 4, 1993, the trial court denied this petition with no evidentiary hearing stating that Appellants have alleged no new grounds which would toll the running of the statute of limitations. We agree and affirm the trial court's dismissal upon procedural grounds.

Appellants' petition is based upon two grounds: first, Appellants claim they failed to receive the effective assistance of trial counsel with conclusory references to the trial attorneys' alleged failure to present a defense, the absence of an election as to which type of first degree murder the State was prosecuting, and allegedly tainted witness identifications. Also, Appellants complain of the alleged ineffectiveness of the representation they received from their post-conviction counsel. In Appellants' second issue, they claim a double jeopardy violation referring to their indictments for both felony murder and premeditated murder arising out of the same transaction.

We first note that this petition was filed in 1992 which is well beyond the three year statute of limitations mandated by the Post-Conviction Procedure Act. Tenn. Code Ann. § 40-30-102 (1990). However, in Burford v. State, 845 S.W.2d 204, 208-09 (Tenn. 1992), our Supreme Court created a due process exception to the statute of limitations finding it inapplicable where a ground for relief does not arise or is not created until such a time that the time bar would deprive a petitioner of a reasonable opportunity to have the claim adjudicated. We do not find that such a reasonable opportunity was foreclosed in the present case. The claims made in the petition, if meritorious, existed and have been available to be pursued since the petitioner was convicted. See State v. Phillips, 904 S.W.2d 123, 124 (Tenn. Crim. App. 1995).

The only issue which has not existed since the time of Appellants' conviction arises from the allegation that Appellants' post-conviction counsel was ineffective. However, Tennessee courts have long held that there is no constitutional nor statutory right to effective assistance of counsel in post-conviction proceedings. State v. Oates, 698 S.W.2d 79, 81 (Tenn. Crim. App. 1985); Recor v. State, 489 S.W.2d 64, 68 (Tenn. Crim. App. 1972), cert. denied, 411 U.S. 920 (1973); see also House v. State, 911 S.W.2d 705, 712 (Tenn. 1995) (holding that "a court should not consider the ineffectiveness of counsel at a prior post-conviction proceeding in deciding whether a ground for relief has been previously determined"), cert. denied, 64 U.S.L.W. 3763 (1996).

Furthermore, Appellants' claims regarding ineffective trial counsel and double jeopardy violations fall within the Post-Conviction Act's prohibition on grounds which have been previously determined or waived. See Tenn. Code Ann. § 40-30-11(1990). "A ground for relief is 'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Id. § 40-30-112(a). In Appellants' first post-conviction appeal, this court upheld the trial court's finding of competent trial

counsel stating that the “allegations [of ineffectiveness] were ventilated in an extended evidentiary hearing.” McKay v. State, No. 25, 1989 WL 17507, at *2 (Tenn. Crim. App. Mar. 1, 1989). Therefore, this ground has been previously determined.

Finally, a ground for post-conviction relief is waived “if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” Tenn. Code Ann. § 40-30-112(b). Our Supreme Court has imposed upon waiver in the post-conviction context “an objective standard under which a petitioner is bound by the action or inaction of his attorney.” House, 911 S.W.2d at 714. Were there any merit to Appellants’ claims with respect to double jeopardy, these issues were waived by their omission from any one of the Appellants’ prior post-conviction petitions as well as the direct appeal of this case.

Accordingly, we affirm the trial court’s dismissal of this post-conviction petition.

JERRY L. SMITH, JUDGE

CONCUR:

JOSEPH B. JONES, PRESIDING JUDGE

GARY R. WADE, JUDGE